



Federal Communications Commission
Washington, D.C. 20554

June 19, 2007

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In Reply Refer To:
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Talking Information Center
c/o Donald E. Martin, Esq.
P.O. Box 8433
Falls Church, VA 22041

Re: NEW(FM), Marshfield, Massachusetts
Facility ID No. 122278
BNPED-20000118ABT
MX Group No. 990512

Petition to Deny

Dear Counsel:

We have before us a Petition to Deny ("Petition") filed on May 2, 2007, by Talking Information Center ("TIC"). TIC is a party to MX Group 990512, a group of two mutually exclusive applicants competing for a permit to build a new noncommercial educational ("NCE") FM station in Marshfield, Massachusetts. TIC argues that the Commission should deny the application of the University of Massachusetts ("UMass"), the applicant group's tentative winner. For the reasons set forth below, we deny TIC's Petition.

On March 27, 2007, the Commission released the *Omnibus Order*,¹ which applied the Commission's NCE comparative selection criteria² to seventy-six groups of mutually exclusive NCE FM applications and tentatively selected one winner in each group. The Commission used a point system selection process, with each applicant's maximum point qualifications determined as of a "snap shot" date of June 4, 2001.³ Absent the Commission's discovery of an error on the face of the application, the Commission generally accepted each applicant's self-certification that it qualified for the points claimed.⁴ Any party that wished to dispute the points awarded could file a petition to deny the application of the group's tentative selectee.⁵ The Commission's *Omnibus Order* delegated authority to the Media Bureau

¹ See *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, FCC 07-40 (rel. Mar. 27, 2007) ("*Omnibus Order*").

² See 47 C.F.R. §§ 73.7000 – 05.

³ Any changes made after that snapshot date could potentially reduce, but could not increase, an applicant's points. See *Omnibus Order*, __ FCC Rcd at __ (¶ 3).

⁴ *Id.* at ¶ 5.

⁵ See 47 C.F.R. § 73.7004; *Omnibus Order* at ¶ 202.

(“Bureau”) to consider such petitions, and to grant and dismiss applications in accordance with the Commission’s tentative determinations in cases where no substantial and material question of fact is raised through the petition to deny process.⁶

In the present group, the Commission tentatively selected UMass’s application for grant because UMass received five points and TIC received three points after the Commission excluded two points that the Commission determined TIC had claimed in error.⁷ In its Petition, TIC disputes the Commission’s finding that the attributable interest of a TIC board member in another radio station precludes an award of two points for diversity of ownership to TIC. TIC also argues that UMass did not submit sufficient documentation to support receipt of points for local diversity of ownership. TIC would thus add two points to its own tally and subtract two points from UMass’s total. Based on these point adjustments, it contends that the Commission should tentatively select the TIC application for grant.

Each claim in TIC’s Petition is based on the local diversity of ownership criterion. An NCE FM station qualifies for two points under this criterion if, from the snap shot date onward, no party to the application had an attributable interest in any other radio broadcast station license or permit with a principal community contour overlapping that of the proposed station *and* the applicant’s own governing documents require that such diversity be maintained.⁸ Applicants whose governing documents cannot be amended without legislative action, such as some state universities, can use an alternative means to demonstrate that they will maintain the characteristics on which diversity points are awarded.⁹ For example, the Commission advised the University of Kansas that it could claim local diversity of ownership points without obtaining an otherwise needed legislative amendment of its governing statute, by certifying that the university would not apply for any facilities that would create a new contour overlap, and describing procedures in place to effectively notify appointing officials and governing board members, both current and future, of their need to act consistently with the university’s diversity representations to the Commission.¹⁰

In claiming points, UMass relied on this alternative approach. UMass submitted a letter from its President stating that no member of its governing board held an attributable interest in an overlapping radio station as of the snap shot date; UMass was created and regulated by statute; and UMass would fulfill its obligation to maintain diversity of ownership by notifying its appointing authority and board members of the need to act consistently with the diversity representations made to the Commission.¹¹ UMass further provided a policy statement dated June 4, 2001, adopted by its Board of Trustees. That statement, in relevant part, directed UMass’s President to notify all board members and the authority that selects those members of the need to maintain diversity; to ask all board members to notify the president of any changes in their radio interests; and to screen all new appointments to the board and to revise new member orientation materials to advise new members of these requirements.¹²

⁶ See *Omnibus Order* at ¶¶ 202-03; 47 C.F.R. §§ 0.61(h), 0.283.

⁷ See *Omnibus Order* at ¶¶ 44-45.

⁸ See 47 C.F.R. 73.7003(b)(2).

⁹ See *Reexamination of Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5094-95 (2001) (“*NCE MO&O*”).

¹⁰ *Id.*

¹¹ See UMass Point Supplement, Exhibit E-2, p. 3.

¹² *Id.* at Exhibit E-2, p. 4.

TIC contends that UMass did not lay the necessary foundation for using the exception to the governing document requirement for maintaining diversity. It argues that information provided by UMass fails: to identify which of its governing documents, if any, could only be amended by legislative action; to identify exactly who appoints its board; and to demonstrate that the appointing authority has any obligation to honor diversity commitments made to the Commission.¹³ UMass responds that its initial documentation was sufficient under the established Commission policy, but nevertheless supplies additional information. Specifically, UMass submits a sworn statement from its General Counsel further identifying its governing statute, the composition of UMass's governing board, and the manner in which board members are selected.¹⁴ The sworn statement provides case law and state constitutional authority for UMass's statement that any amendment to the selection process would require legislative enactment.¹⁵ Finally, UMass states that additional safeguards exist to ensure the maintenance of local diversity of ownership because all members of its Board of Trustees are subject to laws and policies, such as the Massachusetts Conflict of Interest Law, which would require disclosure of any broadcast interests that might conflict with those of UMass.

We find that TIC's argument is without merit. UMass's initial submissions were consistent with the documentation that the Commission required of the University of Kansas under the alternative method for maintaining diversity of ownership qualifications. Moreover, assuming *arguendo* that TIC raised any doubts about the efficacy of UMass's methods, UMass supplied sufficient additional information to rebut any such concerns. There is no substantial and material question of fact for the Bureau to refer to the Commission concerning the award of five points to UMass.

TIC also claims that it would have received five points (potentially resulting in a tie with UMass) had the Commission accepted TIC's own diversity of ownership claim. TIC had disclosed that an officer and director, Edward F. Perry, Jr., was also the sole principal of WATD-FM, which is licensed to the same community as the proposed new station.¹⁶ TIC stressed, however, that Perry would resign from TIC upon grant of a construction permit for the proposed station,¹⁷ and that Perry had advised TIC's Executive Director on May 31, 2001, that TIC should consider the resignation effective immediately if the Commission's policies so required.¹⁸ The Commission rejected TIC's diversity of ownership claim in the *Omnibus Order* because it found that TIC never accepted Perry's resignation, and that Perry's positions at TIC and WATD-FM continued beyond the snap shot date.¹⁹

TIC argues that an award of diversity points to TIC based on Perry's contingent resignation would not conflict with the snap shot date policy cited by the Commission in the *Omnibus Order*.²⁰ TIC

¹³ See *Petition* at 2-3.

¹⁴ See *Letter from Lawrence T. Bench, Interim General Counsel, UMass* (May 31, 2007) (attached to *Opposition to Petition to Deny*).

¹⁵ *Id.* (citing Mass. Const, Pt., c.1, § 1, art. 4; *Corning Glass Works v. Ann & Hope, Inc. of Danvers*, 363 Mass. 409, 421, 294 N.E.2d 354 (1973)).

¹⁶ See *Omnibus Order* at ¶ 45; TIC Point Supplement, Exhibit 2.

¹⁷ See TIC Point Supplement, Exhibit 2.

¹⁸ *Id.*

¹⁹ See *Omnibus Order* at ¶ 45.

²⁰ See *Omnibus Order* at n.118 quoting *NCE MO&O*, 16 FCC Rcd at 5109, n.24 ("Applicants may not enhance their position based on matters that require additional Commission or applicant action. For example, they must consider as pending any applications for which their requests for withdrawal are conditioned on our approval of a settlement (footnote continued...)")

focuses on the Commission's statement that "Applicants may not enhance their position based on matters that require additional Commission or applicant action." TIC argues that this limitation is inapplicable to its application. TIC characterizes Perry's post-snap-shot-date resignation as automatic, requiring no further action on the part of the Commission or TIC. TIC compares Perry's contingent resignation to the contingent divestiture commitments that commercial applicants have used to address multiple-ownership and cross-ownership issues, and argues that the Commission should recognize that there are similar public interest benefits to contingent divestitures in the NCE context.²¹

Under the procedures adopted in the 2001 *NCE MO&O* and followed in the *Omnibus Order*, the Commission does not award points for post-snap-shot-date enhancements. Pending NCE applicants could claim points acquired between their application filing dates and the snap shot date, but not thereafter.²² The Commission gave examples to stress that it would not credit enhancements initiated, but not completed, prior to the snap shot date. For example, the Commission stated that an applicant with pending applications in two NCE groups, could prevent one application from counting against it for comparative purposes by withdrawing that application unconditionally; a withdrawal request made contingent on approval of a settlement agreement, however, would not achieve the same result if the Commission did not approve the settlement by the snap shot date.²³ Similarly, the Commission found in the *Omnibus Order* that Perry's contingent offer to resign from TIC would not prevent Perry's broadcast interests from being attributed to TIC where the contingent event – grant of a permit to TIC – had not occurred by the snap shot date. TIC's claim that Perry's resignation would take effect automatically without further action by TIC or the Commission is immaterial because the resignation did not occur by June 4, 2001.²⁴ Indeed, Perry continues even now to hold positions with TIC and WATD-FM. Essentially, TIC contends that the Commission should alter its policies by crediting NCE divestiture promises that are made, but not implemented, by the snap shot date. Such arguments are appropriately raised in petitions for rulemaking, not petitions to deny.

TIC has failed to make any *prima facie* showing that might alter the Commission's tentative outcome in Group 990512. TIC has also failed to show that the grant of UMass's application would be contrary to the public interest.

Accordingly, IT IS ORDERED, That the Petition to Deny filed on May 2, 2007, by the Talking Information Center IS DENIED.

IT IS FURTHER ORDERED, That the application of University of Massachusetts (File No.

agreement. Similarly, they must include as existing authorizations any station for which an assignment of license has not yet been consummated, even if an application to assign has been filed or approved.").

²¹ See *Petition* at 5-6. For example, TIC contends that Perry's contingent resignation served the public interest by preventing the loss of a six-year synergistic relationship between TIC and WATD-FM from the snap shot date through present. *Id.*

²² See *NCE MO&O*, 16 FCC Rcd at 5109.

²³ *Id.* at 5109, n.24.

²⁴ Additionally, TIC's argument that the Commission was only concerned with "matters that require additional Commission or applicant action" takes that language out of context to place inappropriate emphasis on the manner in which of a post-snap-shot-date divestiture occurs. Moreover, TIC would be incorrect to say that Perry's divestiture would be independent of any Commission or applicant action where that divestiture was contingent on the earlier of grant of a construction permit (a Commission action) or TIC's acceptance of the tendered resignation (an applicant action).

BNPED-20000118ABT) IS GRANTED CONDITIONED UPON its compliance with Section 73.7005 of the Commission's Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system.

IT IS FURTHER ORDERED, That the mutually exclusive application of the Talking Information Center (File No. BNPED-20000118ADQ) IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: University of Massachusetts